STATE OF MICHIGAN

COURT OF APPEALS

DIETER DAUBERMAN,

Plaintiff-Appellant,

v

MICHIGAN AUTOMOTIVE COMPRESSOR, INC., a/k/a MACI, and KELLY SERVICES, INC.,

Defendants-Appellees.

UNPUBLISHED
July 19, 2005

No. 261215
Jackson Circuit Court
LC No. 04-002130-CZ

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

In this case alleging religious discrimination, plaintiff appeals as of right from the trial court's orders granting defendants summary disposition and denying his motion to amend his complaint to add a retaliation claim against defendant Kelly Services, Inc. (KSI). We affirm.

We review a trial court's decision on a motion for summary disposition de novo. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 721. Our review is limited to the substantively admissible evidence that was offered in support of and in opposition to the motion, MCR 2.116(G)(5); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002), and we must consider the evidence in a light most favorable to the nonmoving party. *Nastal supra*. Where the submitted evidence fails to establish a genuine issue of material fact, the moving party should be granted judgment as a matter of law. *Id.*

Plaintiff first argues that the trial court applied an unduly restrictive interpretation of the Elliot Larson Civil Rights Act (ELCRA) – when it stated that ELCRA did not protect employees who discussed religion during work hours after having been asked not to do so by disinterested parties – because the act protects against discrimination based on status as well as conduct.[1] ELCRA provides that an employer shall not

[1] The context in which an issue of religious practice generally arises appears to involve the accommodation of a plaintiff's religious practices. See *Dep't of Civil Rights ex rel Parks v Gen* (continued…)

> [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

We agree with plaintiff that the statute encompasses both religious practices and beliefs.

In determining the scope of protection afforded by the statute, we examine the statutory language and give the words used by the Legislature their common and ordinary meaning. *Nastal, supra* at 720. Dictionary definitions may be consulted to determine the common usage of a word. *Id.* at 723. The meaning of a word or statute must also be determined from the context or setting in which it is used. *Breighner v Michigan High School Athletic Ass'n,* 471 Mich 217, 232; 683 NW2d 639 (2004). The word "religion" is defined in *Random House Webster's College Dictionary* (2001) as:

> 1. a set of beliefs concerning the cause, nature, and purpose of the universe, esp., when considered as the creation of a superhuman agency or agencies, usu. involving devotional and ritual observances, and often containing a moral code for the conduct of human affairs. 2. a specific fundamental set of beliefs and practices generally agreed upon by a number of persons or sects: *the Christian religion.* 3. the body of persons adhering to a particular set of beliefs and practices: *a world council of religions.* . . . 5. the practice of religious beliefs; ritual observance of faith. 6. something a person believes in and follows devotedly. . . . [Emphasis in original.]

Had the Legislature intended to preclude protection for religious practices, it would have qualified the word "religion," as was done with respect to "marital status" in MCL 37.2202(1)(a). See *Veenstra, supra* at 160. Nevertheless, this is not a case involving a claim of a religiously mandated observance. Plaintiff's own deposition testimony established that he was not required to share his religious beliefs in the workplace, particularly when it burdened a co-worker who did not want to hear what he had to say. A personal need to share religious beliefs is not the same as a religiously mandated observance. Cf. *Storey v Burns Int'l Security Services,* 390 F3d 760, 764-765 (CA 3, 2004) (rejecting a discrimination claim under federal civil rights act grounded on an individual's attachment of religious symbolism to a Confederate flag that he displayed in the workplace).

Here, even accepting that the statute encompasses religious practices, plaintiff has not shown any basis for disturbing the trial court's decision to the grant summary disposition in favor of defendants. Nor has plaintiff shown any genuine issue of material fact to preclude summary disposition in favor of either defendant with regard to whether he suffered an adverse employment action because of his religious beliefs. In this regard, although plaintiff argues that

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(…continued)

Motors Corp, 412 Mich 610; 317 NW2d 16 (1982). But the instant case does not involve any alleged right of accommodation. Indeed, plaintiff's attorney advised the trial court that he was not pursuing any accommodation claim. Plaintiff's concession in this regard waived any accommodation claim. See *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000).

genuine issues of material fact exist, plaintiff has failed to adequately brief his particular theories of discrimination with regard to each defendant. A party may not merely announce a position and leave it to this Court to discover and rationalize its basis. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).[2]

With regard to plaintiff's first count concerning his loss of any assignment to a temporary position at MACI through KSI, it is clear that plaintiff failed to establish factual support for his claim under the indirect or circumstantial method of proof, which utilizes the burden-shifting approach in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003).

Although the *McDonnell* test is tailored to the particular facts of the case, plaintiff did not present facts that would give rise to a presumption of religious discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). Plaintiff did not establish that he was treated differently from a similarly situated employee outside of his protected group. *Smith v Goodwill Industries of W Michigan, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000). Having failed to establish a prima facie case, it is not material whether the alleged adverse employment actions were based on false reasons. The credibility of the employer's proffered reasons for the employment action is not material until after a prima facie case of discrimination has been established. *Sniecinski, supra* at 134. To survive summary disposition, plaintiff was required to raise a triable issue that religious discrimination was a motivating factor underlying the adverse employment action. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175-176; 579 NW2d 906 (1998) (Weaver, J.).

Plaintiff also failed to establish a triable issue of religious discrimination against either defendant under the direct evidence method of proof. Direct evidence means evidence that, "'if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's action.'" *Sniecinski, supra* at 133, quoting *Hazle, supra* at 462. If the case involves mixed motives, a plaintiff must prove that the employer's discriminatory animus was more likely than not a substantial or motivating factor for the employer's action. *Sniecinski, supra.* Where a discrimination action is based on the conduct of a defendant's agent, as in this case, principles of respondent superior are applied to assess such liability. *Ashker v Ford Motor Company*, 245 Mich App 9, 14; 627 NW2d 1 (2001). Common-law agency principles are considered in determining if the "employer" is liable for the conduct of its employees. *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000).

Here, plaintiff claims that three decisionmakers were involved in adverse employment actions against him, Debbie Boyle, a fellow KSI employee, Terri Cybulski, KSI's partnered

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[2] In any event, plaintiff has abandoned any argument concerning the second count of his complaint because he has not briefed his claim that defendant Michigan Automotive Compressor, Inc. (MACI), discriminated against him by not hiring him for a permanent position. When a party does not brief the merits of a claim of error, this Court will deem the issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

staffing manager, and Mary Potter, the MACI supervisor for the quality assurance (QA) department to which both Boyle and plaintiff were assigned in April 2001. We conclude, however, that plaintiff has not established any factual support for his position that Boyle had decisionmaking responsibilities with respect to his employment. Rather, the evidence indicated that Boyle, the work leader for the degassing testing to which plaintiff was assigned, complained to Potter about plaintiff excessively discussing religion during the degassing tests, notwithstanding her request that he stop, and reported that plaintiff dropped a part during testing.

Although there might be circumstances in which it is appropriate to find a causal connection between one employee's adverse employment decision and another employee's discriminatory animus, *Rasheed v Chrysler Corp*, 445 Mich 109, 135-136; 517 NW2d 19 (1994), *Noble v Brinker Int'l, Inc*, 391 F3d 715, 723-724 (CA 6, 2004), and *Christian v Wal-Mart Stores, Inc*, 252 F3d 862, 877-878 (CA 6, 2001), amended 266 F3d 407 (2001), the evidence in this case did not support a reasonable inference that Potter was acting as a conduit for Boyle's alleged prejudice when she took steps to have plaintiff removed from the QA department.

The fact that Boyle was upset about being in a position in which she had to listen to plaintiff discuss religion was made known to Potter. There was no evidence from which it could be inferred that the particular religious beliefs expressed by plaintiff were made known to Potter or caused her to take adverse employment action against plaintiff. Therefore, plaintiff has not established any genuine issue of material fact relative to whether Potter's request that plaintiff be removed from the QA department was motivated by discriminatory animus on account of his religious beliefs. Further, plaintiff has not established any genuine issue of material fact relative to whether Cybulski's subsequent decision not to reassign plaintiff to another MACI department was motivated by discriminatory animus because of his religious beliefs. Summary disposition was properly granted under MCR 2.116(C)(10) in favor of both defendants.

Finally, the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint to add a retaliation claim against KSI. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). The trial court did not merely find undue delay, but found, consistent with *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997), that prejudice can be found "when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." See also *Franchino v Franchino*, 263 Mich App 172, 192; 687 NW2d 620 (2004).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens